

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1032 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

MOAIYEDBHAI MULLA ABBASHBHAI KARKHANAWALA

Versus

KANKARIA MANINAGAR NAGRIK SAHAKARI BANK LTD

Appearance:

1. Special Civil Application No. 1032 of 2001
MR JT TRIVEDI for Petitioner No. 1-4
MR BJ TRIVEDI for Petitioner No. 1,2
MR SH LIGHTWALA for Petitioner No. 1
MR KJ VYAS for Respondent No. 1
..... for Respondent No. 2-3
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CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 16/10/2002

ORAL JUDGEMENT

Rule. Amin appearing on behalf of Mr.Vyas waives service of rule on behalf of respondents. With the consent of parties matter is taken up for final hearing today.

2. The short facts of the case are that the respondent No.1-Bank filed Lavad Suit No.1744/95 before the Registrar, Board of Nominee for recovering a sum of Rs.2,53,055/- with interest at the rate of 21% p.a. The case of the petitioner is that they had engaged an advocate and they appeared in response to summons received by them. However, thereafter, as per the petitioners since they were busy with the treatment of their near relative they could not communicate with their lawyer who was engaged for defending the suit and since the lawyer of the petitioners did not remain present and the reply was not filed within time the defence was closed and the learned Nominee proceeded exparte and ultimately passed the exparte judgment and award on 7.8.96 whereby the suit is allowed for a sum of Rs.2,53,055/- with interest at the rate of 21% p.a. and costs of Rs.4,040/-.

3. The petitioner, thereafter, preferred application being Restoration Application No.222/96 to the learned Nominee for restoration of the matter by setting aside the exparte award. There was some delay in filing the application for setting aside the exparte judgment and award. The learned Nominee considered the matter and passed the order on 24.2.1998 whereby the application for condonation of delay and application for setting aside the exparte judgment and award and the stay applications were rejected. The learned Nominee mainly considered the aspect that the ground shown for not communicating to the lawyer on account of sickness of near relative can not be said to be proper and therefore application has been rejected.

4. The petitioner preferred revision application being Revision Application No.111/98 before the Tribunal against the order dated 24.2.1998 passed by the Nominee below restoration application. The tribunal after hearing both sides rejected the revision only on the ground that after summons was served it was the duty of the party to submit the reply and since the same is not properly complied with interference is not called for and hence the revision is rejected. The petitioners, under these circumstances, have preferred this petition.

5. The learned counsel appearing on behalf of the petitioners have mainly contended that the judgment and

award passed by the Nominee is exparte and on account of communication gap between the petitioners and their lawyer the matter has proceeded exparte. It has been submitted that the aforesaid judgment and award came to the knowledge of the petitioner only on 3.10.1996 and immediately on 1.11.996 application for restoration was submitted. It has been submitted on behalf of petitioners that instead of taking lenient view of the matter the learned Nominee has dismissed the restoration application and the same is confirmed by the tribunal.

6. Learned counsel for the petitioners also agreed to pay the costs which may be imposed by the court on account of default committed by the petitioner in not remaining present through their lawyer before the learned Nominee and as a consequence thereof the bank is put to inconvenience and passed the exparte judgment and award.

7. On behalf of respondents, Mr.Amin appearing for the bank has supported the order passed by the tribunal as well as the learned Nominee. Mr.Amin submitted that since the lawyer of the petitioner did not remain present no fault can be found with the order of the Nominee and its confirmation thereof by the tribunal.

8. Having considered the above and a perusal of the order passed by the tribunal, I am of the view that the learned Nominee as well as the Tribunal have taken a very strict and technical view of the matter. It is true that after the receipt of summons, it is expected that the parties shall remain present and defend the suit. However, in the present case, the ground shown on behalf of the petitioners is the sickness of their near relative and as a result thereof there was communication gap between the petitioners and their lawyer. The learned Nominee has passed the judgment and award on 7.8.96 and it is the case of the petitioners that on 3.10.96 they came to know about the exparte judgment and award and immediately on 1.11.996 application for restoration has been filed . In my view, the learned Nominee could have considered the circumstances shown by the petitioners and at the most the learned Nominee could have put the petitioners to terms of paying costs and also some additional deposit with a view to test the bonafides of the petitioners. If the exparte judgment and award is allowed to operate in my view it would result into taking away the defence of the party for all times to come. But at the same time, while considering the matter for setting aside the exparte judgment and award the court should see to it that the bonafides of the person moving the application for setting aside the exparte judgment

and award are made clear or rather tested. Further, no situation should be created whereby the defaulter would be encouraged to enter into dilatory tactics. In my view with a view to maintain balance of both the aforesaid aspects, the court while setting aside the exparte judgment and award can put the petitioners to terms of depositing 25% of decretal amount and also costs to respondents who have suffered on account of negligence. More or less in a similar case, i.e. Spl.C.A.No.3068/01 (Kalubhai Dhulabhai Makwana vs State of Gujarat) decided on 30.9.02 this court for the reasons recorded therein while setting aside the exparte judgment and award and remanding the matter had put the petitioners to term of depositing 25% of decretal amount and also costs of Rs.10,000/-. In the present case, the suit amount is less and therefore I am of the view that costs of Rs.5,000/- would meet with the ends of justice. The aforesaid aspect is not properly considered by the tribunal and the tribunal in my view has committed error apparent on the face of record while rejecting the revision application. The only reasons recorded by the tribunal are that since steps are not taken for the appearance of advocate, the application for restoration can not be granted. A perusal of reasoning recorded by the tribunal shows that the error is committed by the tribunal on the face of it and the tribunal while considering the matter has not taken into consideration the settled legal position for exercising the judicial discretion by the tribunal while considering the matter of setting aside the exparte judgments and awards and therefore in my view the tribunal has committed jurisdictional error while deciding the revision application. In my view, the learned Nominee as well as the Tribunal while considering the matter for setting aside the judgment and award ought to have put the petitioners to reasonable terms and also ought to have directed the petitioners to pay costs to the respondent-Bank. However, the said aspect is not considered and therefore the orders of the learned Nominee as well as Tribunal deserve to be quashed and set aside and the matter is required to be considered keeping in view the settled principles of judicial discretion while remanding the matter to the learned Nominee for reconsidering the matter afresh.

9. Considering the above, I am of the view that the following directions would meet with the ends of justice:

- (i) The petitioner shall deposit 25% of the awarded amount with the respondent-bank within a period

of three months from today.

(ii) The amount of Rs.75,000/- deposited by the petitioners pursuant to the interim order of this court and bond amount of Rs.59,001/- shall be given credit of while considering the amount of 25% deposit. As a necessary consequence, the petitioner will be required to deposit the balance amount within a period of three months from today so as to make 25% of awarded amount.

(ii) After the said amount is deposited with the respondent-Bank the learned Nominee after giving opportunity to the respondent-Bank as well as to the petitioner shall re-try the suit and render decision in accordance with law within six months from the date on which it is reported to the learned Nominee that the aforesaid amount of 25% is deposited by the petitioner as directed by this court.

(iii) If the petitioner fails to deposit 25% of decretal amount as indicated earlier, within three months from today, the learned Nominee will not be required to retry the suit and the bank shall be at liberty to recover the awarded amount as per exparte judgment fully from the petitioner in accordance with law.

10. In addition to the above, the petitioner shall pay the costs of Rs.5,000/- to the respondent bank towards litigation before the tribunal as well as before this court and such amount of costs shall be paid within one month from today.

11. The petition is allowed in terms of above directions only and rule is made absolute accordingly.

16.10.02 (JAYANT PATEL, J)